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# Taylor v. Canyon County Bd. of Comm'rs Respondent's Brief Dckt. 34809

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No. 34809

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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NANCY TAYLOR and DOUG HOUSTON

Petitioners,

and

KIRBY VICKERS and CHERYL VICKERS, husband and wife,

Petitioners/Appellants,

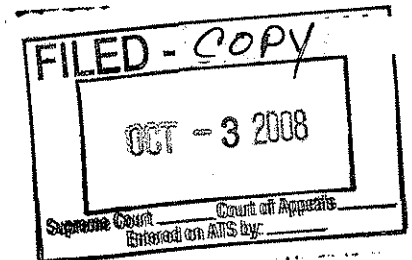
v.

CANYON COUNTY BOARD OF COMMISSIONERS,  
a political subdivision of the State of Idaho,

Defendant/Respondent

EDWARD SAVALA,

Intervenor/Respondent



---

**INTERVENOR/RESPONDENT'S BRIEF**

---

Appeal from the District Court of the Third Judicial District  
Of the State of Idaho, in and for the County of Canyon,  
Honorable Gordon W. Petrie, District Judge, Presiding

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*Counsel for Kirby & Cheryl Vickers*

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## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

This is an appeal from a decision by the Canyon County Board of Commissioners ("Board" or "BOCC") granting approval of Dr. Edward Savala's application for a comprehensive plan map amendment and conditional rezone of his property consisting of approximately eight (8) acres from "A" (Agricultural) to "C-2" (Community Commercial). Appellants lack statutory authority to appeal and failed to preserve any challenge to the application or amendment of the County's 1995 Comprehensive Plan (hereinafter "1995 CCCP"). The County Commissioners conducted extensive hearings and made their decision based on substantial and competent evidence.

### II. STATEMENT OF THE FACTS

Intervenor/Respondent and Applicant, Dr. Edward Savala ("Savala"), is the owner of an approximately eight (8) acre parcel in an "A" (Agricultural) zone (hereinafter referred to as the "subject property"). The subject property is located on the South side of Highway 55 or Karcher Road approximately one quarter mile west of the intersection of Karcher Road and Pride Lane. (R. Ex. *Commissioner's Clerk's Record, Filed 1-11-07* (hereinafter "CCR"), p. 46). There are five platted subdivisions within one mile of subject property with a total of 156 lots. (R. Ex. CCR, p. 47). A red circle or "dot" on the 1995 Canyon County Comprehensive Plan Map (hereinafter "1995 CCCP Map") is located across Karcher Road from the subject property. 1995 CCCP Map. The red dot on the 1995 CCCP Map designates the area as a Rural Center or Neighborhood Commercial. (R. Ex. CCR, p. 47; 1995 CCCP Map). There are three red dots



and commercial uses in the area of the subject property. (1995 CCCP Map; R. Ex. *Transcripts of Commission Hearings dated 10/25/05, 10/27/05, 03/14/06, 03/31/06* (hereinafter “10/25/05 Transcript,” “10/27/05 Transcript,” “03/14/06 Transcript,” “03/31/06 Transcript”), 10/25/05 Transcript, Tr. p. 41, ll. 11-14; R. Ex. CCR, p. 88.)

Dr. Savala would like to locate a medical and dental clinic and promote other commercial uses on his property.<sup>1</sup> (R. Ex. 03/14/06 Transcript, Tr. p. 28, ll. 8-20, 13-15, p. 61. ll. 1-15.)

The subject property consists primarily of moderately suited soils. (R. Ex. CCR, p. 48). The property is irregularly shaped and Dr. Savala’s existing home, corrals, outbuilding and gravel road occupy a portion of the property. (R. Ex. 10/25/05 Transcript, Tr. p. 37, ll. 1-15, p. 56 ll. 13-22.) The subject property is not prime agricultural ground. (R. Ex. 10/25/05 Transcript, Tr. p. 73 l. 5.) Attempts to grow crops have resulted in substandard yields due to the alkaline soils. (R. Ex. 10/25/05 Transcript, Tr. p. 73 ll. 6-9). The property is also not economically viable for farming because of its small size. (R. Ex. CCR, p. 48).

The subject property has frontage on to Highway 55 with an existing access on to Highway 55 along the Eastern border on the subject property. (R. Ex. CCR, p. 48; R. Ex. 10/25/05 Transcript, Tr. p. 56, ll. 16-21.) The existing access on the eastern edge of the property will be improved and used for access to the commercial development. (R. Ex. CCR, p. 48-49.) Initial discussions with Idaho Transportation Department (“ITD”) Engineers did not generate any

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<sup>1</sup> The Commissioners excluded the following commercial uses: bowling alley, public utility transmission facility, radio or television broadcasting, permanent fire works sales and storage, mini storage or RV storage, RV Park, staging areas for construction and landscaping contractors, and telecommunications towers. (R. Ex. CCR, p. 149; R. Ex. CCR, p. 166.)

concerns that they felt could not be addressed. (R. Ex. 10/25/05 Transcript, Tr. p. 125, ll. 18-20.) A commercial access was initially denied by ITD. (R. Ex. CCR, p. 48.) The applicant was pursuing further approval with ITD. (R. Ex. CCR, p. 48; R. Ex. 03/14/06 Transcript, Tr. p. 75, ll. 21-23.) The stopping sight distance from the proposed access for the subject property for the eastbound lane of Karcher Road is 660 feet which meets and exceeds the ITD required stopping sight distance of 645 feet for this road. (R. Ex. CCR, p. 48.) The applicant will be improving Karcher Road and the access to the property by widening the road and constructing a right turn deceleration lane and a left turn bay at his expense. (R. Ex. CCR, p. 48-49). The Board's approval of Dr. Savala's request is contingent upon compliance with ITD and other agency requirements. (R. Ex. CCR, p. 149; R. Ex. CCR, p. 166.)

On May 4, 2006, the Canyon County Board of Commissioners signed their findings granting Dr. Savala's application for a comprehensive plan map change and a conditional rezone to C-2 "Community Commercial." (R. Ex. CCR, p. 145-146.) On October 16, 2007, District Judge Gordon Petrie issued his decision affirming the Commissioner's decision. (*Memorandum Decision on Judicial Review*, R. pp. 54-71.)

### **III. COURSE OF PROCEEDINGS**

The Planning and Zoning Commission conducted a hearing on May 18, 2005 and issued their written recommendation on June 2, 2005. (R. Ex. CCR, p. 9.) The Canyon County Commissioners conducted a total of three *de novo* hearings on this application. (R. Ex. CCR, p. 17.) This expansive exercise in due process conforms to the procedure established by the Idaho

Supreme Court<sup>2</sup> and Idaho Code § 67-6509(1). The first hearing was held on October 25, 2005. (R. Ex. CCR, p. 17). That hearing was continued to October 27, 2005 for deliberation. (R. Ex. CCR, p. 10.) On October 27, 2005, after extensive deliberation, the Board determined that the application was in accordance with the 1995 Comprehensive Plan, that the general type of development was appropriate for the area and that the comprehensive plan map should be amended. (R. Ex. CCR, pp. 50-53.) Since the Commissioners considered this a material change from the Planning and Zoning Commission's recommendation regarding the map amendment, the Board initiated a second hearing on October 27, 2005, with said hearing being continued to March 14, 2006. (R. Ex. CCR, pp. 10-11.) On March 14, 2006 the Board conducted a second hearing, taking testimony and evidence and then continuing the hearing to March 31, 2006 to hear rebuttal testimony and conduct deliberation. (R. Ex. CCR, pp. 78-79). After further detailed deliberation, the Board again determined that the general type of growth should be permitted in the area, that the Comprehensive Plan map should be amended and that the requested conditional rezone should be approved. (R. Ex. CCR, pp. 78-71.) Since the Commissioners felt this was a material change from the recommendation of the P&Z Commission regarding the conditional rezone, the Board initiated its third hearing on March 31, 2006. (R. Ex. 03/31/06 Transcript, Tr. p. 103, ll. 9-18.) After taking further testimony the Board determined that the application conformed to the comprehensive plan and zoning ordinance and approved the conditional rezone request and the execution of a development agreement. (R. Ex. 03/31/06 Transcript, Tr. p. 191, ll. 1-12.) The County Commissioners issued their written

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<sup>2</sup> See, *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 958 P.2d 583 (1998).

findings, signed the ordinance and executed the Development Agreement on May 4, 2006. (R. Ex. CCR, p. 145-146.) On or about June 1, 2006, the Appellants filed a petition for judicial review of this matter.

#### **ISSUES ON APPEAL**

Counsel for the Appellants essentially presented the following issues:

1. Whether the Board erred in amending the 1995 CCCP Map.
2. Whether the District Court erred by affirming the Board's action amending the 1995 CCCP Map.
3. Whether the Board erred in amending the 2010 Comprehensive Plan Map.
4. Whether the District Court erred in affirming the Board's action to amend the 2010 Comprehensive Plan Map.
5. Whether the Board's decision constituted illegal spot zoning.
6. Whether the Board erred in approving the conditional rezone.
7. Whether Appellants are entitled to reasonable attorney's fees and costs pursuant to Idaho Code § 12-117(1).

#### **ADDITIONAL ISSUES PRESENTED ON APPEAL**

1. Do Appellants lack standing to pursue this appeal when their appeal is not based upon statutory authority?
2. Did Appellants fail to preserve the issue regarding their challenge to whether the County Commissioners could amend the Canyon County 1995 CCCP Map?
3. Does the Canyon County 2010 Comprehensive Plan have any application to the approval of Savala's application?
4. Are the Respondents and Intervenor/Respondent entitled to an award of Reasonable attorney's fees and costs?

## ARGUMENT

### I. STANDARD OF REVIEW

The Idaho Rules of Civil (“IRCP”) require that judicial review of a local government action be based upon a statute granting said authority. IRCP 84(a)(2)(A), (C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. *Cobbley v. City of Challis*, 143 Idaho 130, 139 P.3d 732, 735 (2006). *See also Highlands Development Corporation v. City of Boise*, 145 Idaho 958, 961, 188 P.3d 900, 903 (2008), citing *Gibson v. Ada County Sheriff’s Department*, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003). The Idaho Administrative Procedures Act, Idaho Code §§ 67-5201 *et seq.* (“IAPA”) and its judicial review standards apply to agency actions. *Gibson* at 7 and 847. Counties and city governments are not agencies; they are considered local governing bodies rather than agencies for purposes of the IAPA. *Id.* County government, specifically the Board of County Commissioners, is not an agency and therefore the IAPA does not apply. *Giltner Dairy LLC v. Jerome County*, 145 Idaho 630, 632, 181 P.3d 1238, 1240 (2008).

The Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538 (“LLUPA”) permits judicial review of some land use decisions made by a local government entity. LLUPA grants the right to judicial review pursuant to the IAPA to “[a]n affected person aggrieved by a decision.” *Giltner Dairy* at 1240. “An ‘affected person’ is defined as ‘one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development.’ I.C. Section 6521(1).” *Id.* An amendment to the comprehensive plan map does not authorize development. *Id.* There is no provision in LLUPA granting judicial review of an

initial zoning classification. *Highlands* at 903. This appeal of the County's decision on the comprehensive plan map amendment and the zoning and corresponding development agreement pertaining to Savala's property lacks statutory foundation and must be dismissed.

If the Court determines that the appellants have statutory authority to pursue this appeal, and the IAPA, applies then there is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1). The Board's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record. *Cowan v. Board of Commissioners of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006); *see also, South Fork Coalition v. Board of Comm'rs of Bonneville County*, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990). The court defers to the Board of Commissioner's findings of fact unless the findings of fact are clearly erroneous. *Evans v. Teton County, Idaho Board of Commissioners*, 139 Idaho 71, 75, 73 P.2d 84 (2003); *see also, Whitted v. Canyon County Bd. Of Com'rs*, 137 Idaho 118, 121, 44 P.3d 1173 (2002). The court must affirm the Board of Commissioners unless it determines the Board of Commissioners findings, inferences, conclusions or decisions: (1) violate statutory or constitutional provisions; (2) exceed the agency's statutory authority; (3) were made upon unlawful procedure; (4) were not supported by substantial evidence on the record; or (5) were arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). The party attacking a

zoning board's action under Idaho Code §§ 67-5279(3) must first illustrate that the zoning board erred in a manner specified in Idaho Code §§ 67-5279(3) and must then show that a substantial right of the party has been prejudiced. *Price* at 429. *See also, Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998) (citing *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct.App. 1996)).

**II. THE APPELLANTS DO NOT HAVE STATUTORY AUTHORITY TO PURSUE THIS APPEAL OF THE BOARD'S DECISION TO AMEND THE COUNTY COMPREHENSIVE PLAN THEREFORE THIS COURT LACKS JURISDICTION.**

**A. Appellants Lack Authority to Appeal the Comprehensive Plan Amendment.**

Appellants lack statutory authority to pursue this appeal under the IAPA. Appellant's filed their appeal for judicial review based on Idaho Code § 67-5270 (IAPA), Idaho Code § 67-6521 (LLUPA) and IRCP 84. *Petition for Judicial Review*, R. pp. 3-11. Judicial review of a local government action must be based upon a statute granting authority to pursue the appeal. IRCP 84(a)(2)(A), (C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. *Cobbley* at 735. *See also Highlands Development Corporation v. City of Boise*, 145 Idaho 958, 961, 188 P. 3d 900, 903, citing *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 8; 72 P.3d 845, 848 (2003). The IAPA and its judicial review standards apply to agency actions and county governments are considered local governing bodies rather than agencies for purposes of the IAPA. *Gibson* at 7 and 847. County government, specifically the Board of County Commissioners, is not an agency and therefore the IAPA does not apply. *Giltner Dairy LLC v. Jerome County*, 145 Idaho 630, 632,

181 P.3d 1238, 1240 (2008). Therefore the IAPA does not provide Appellants with the requisite authority and therefore this court lacks jurisdiction pursuant Idaho Code § 67-5270.

Appellants lack authority to pursue this appeal under LLUPA. LLUPA grants the right to judicial review pursuant to the IAPA to “[a]n affected person aggrieved by a decision.” *Giltner Dairy* at 1240. “An ‘affected person’ is defined as ‘one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development.’ I.C. Section 6521(1).” *Id.* Comprehensive plan amendments and rezoning of property do not constitute issuance of a permit authorizing development.

Savala’s application requested approval of multiple parts. Savala requested approval of an amendment to the Comprehensive Plan Map. (R. Ex. CCR, p. 9.) An amendment to the comprehensive plan does not authorize development. *Giltner Dairy* at 1240. Comprehensive Plans are general documents used for planning purposes and project future development patterns. The purpose of the comprehensive plan map is to indicate “... suitable projected land uses for the jurisdiction.” Idaho Code § 67-6508(e). The Canyon County Comprehensive Plan itself clearly states this concept. The comprehensive plan map “... depicts desired land use patterns in a general way....” 1995 CCCP, p. 3. “The Plan Map designates land use areas. The designations are general and are to be used for planning purposes.” 1995 CCCP, p. 3.

Idaho Courts have consistently held that comprehensive plans and maps are general guides to future or projected land uses. “A comprehensive plan reflects the ‘desirable goals and objectives or desirable future situations’ for land use within a jurisdiction.” *Urrutia v. Blaine County Board of Comm.*, 134 Idaho 353, 2 P.3d 738 (2000). Amendment of a comprehensive



plan does not equate to some thing so specific as authorization of a permit for development. If there is no statutory authorization to appeal, the matter must be dismissed because this court lacks jurisdiction to consider the issue. *Highlands* at 904. The Appellants do not have statutory authority to challenge the amendment of the Comprehensive Plan so this matter must be dismissed.

**B. Appellants Lack Authority to Appeal the Zoning and Development Agreement Approval.**

Appellants also attempt to challenge the zoning approval for Dr. Savala. LLUPA contains “no provision granting judicial review of the initial zoning classification...” *Highlands* at 903. There is no difference between initial zoning and rezoning; the fundamental nature and status for development is the same. “LLUPA grants the right of judicial review to persons who have applied for a permit required or authorized under LLUPA and were denied or aggrieved by the decision on the application for the permit. IC 67-6517.” *Highlands* at 903. This court in the *Highlands* case noted that LLUPA refers to special use permits, subdivision permits, planned unit development permits, variance permits and building permits. *Id.* It does not mention any permit that would relate to the zoning of land. *Id.* Savala’s application does not involve any of the aforementioned types of permits at this point and, as in *Highlands*, this case does not involve the granting or denial of a permit authorizing development.

The Development Agreement between the County and Savala is simply a contractual reflection of the zoning decision and grants no additional development rights to Savala. Development agreements are addressed in Idaho Code § 67-6511A. “Each governing board

may, by ordinance adopted or amended in accordance with the notice and hearing provisions provided under section 67-6509, Idaho Code, require or permit as a condition of rezoning that an owner or developer make a written commitment concerning the use or development of the subject parcel.” Idaho Code § 67-6511A. Idaho Code § 67-6511A provides that these written commitments may be required as a condition of rezoning property. Nothing in the statute necessarily turns these written commitments, which accompany rezones, into an issuance of a permit to develop. Savala’s development agreement granted him no additional rights to develop beyond the general approval contained in the rezone decision. (*See Development Agreement*, R. Ex. CCR, p. 157.) The agreement mirrors the conditional rezone with some additional liability and reversion protections for the county and should not be treated as a permit authorizing development any more than the rezone itself.

Appellants are appealing the approval a comprehensive plan map amendment, the change in the underlying zoning of the property and the approval of a development agreement. The decisions of this court in *Highlands* and *Giltner* clarify that there is no statutory basis supporting an appeal of a comprehensive plan map amendment or zoning of property. The written commitment between Savala and the County is a reflection of the rezone and should be treated the same as the zoning decision for purposes of this appeal. Therefore, Appellants lack authority to bring this appeal and this matter should be dismissed for lack of jurisdiction.

Savala did not request a conditional use permit for his property.<sup>3</sup> Conditional use permits and rezones, conditional or otherwise, are very different in their nature, purpose and process. A conditional use permit is for a specific use and is laid over the top of existing zoning. They are for a limited duration and if not acted upon they expire.<sup>4</sup> Zoning of property establishes a larger spectrum of potential uses and the overall regulations established in the zoning ordinance applicable to that zone. Rezoning of property is handled through the amendment of the county zoning ordinance and is addressed in Idaho Code § 67-6511. A conditional rezone of property is still a rezone of property with both following the same procedural requirement of amending the zoning ordinance under Idaho Code § 65-6711. An effort to argue that a conditional rezone or a development agreement should be treated the same as a conditional use permit is erroneous and not supported by LLUPA or this court's reasoning in *Highlands*.

**III. IF APPELLANTS HAVE STATUTORY AUTHORITY TO PURSUE THIS APPEAL THEN THEY FAILED TO PRESERVE THEIR CHALLENGE TO THE COUNTY COMMISSIONERS ABILITY TO AMEND THE 1995 COMPREHENSIVE PLAN.**

**A. Appellants cannot raise new issues on appeal.**

Appellants cannot now challenge the application and amendment of the 1995 CCCP. Judge Petrie in his memorandum decision found "It is undisputed by the parties that Idaho law

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<sup>3</sup> Special Use Permits are the same as Conditional Use Permits but the term used varies per jurisdiction. Both are addressed under Idaho Code § 67-6512 which states "...[E]ach governing board may provide by ordinance adopted, amended or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for the processing of applications for special or conditional use permits." The county provides for Conditional Use Permits in Chapter 7 Article 7 of the Canyon County Code (CCC), rezones, conditional rezones and development agreements are addressed in Chapter 7 Article 6. The state legislature and Canyon County both consider them as separate and distinct actions.

<sup>4</sup> The use authorized by the Conditional Use Permit must commence within three years and be completed within five years. CCC 07-07-13 (1).

clearly supports the proposition that the law in place at the time someone makes a planning and zoning application is the law governing the decisions made on that application. *Urrutia*, 134 Idaho at 359-60.” (*Memorandum on Judicial Review*, R. p. 58.) Appellants attempted to argue for the first time at the District Court level that the 1995 CCCP should not be the applicable plan and that the Commissioners could not consider amendment of the 1995 CCCP Map. “Despite the repeal and replacement of the 1995 Comprehensive Plan, the Board then voted to amend the 1995 comprehensive plan through its final order in May 2006.” (*Petition for Judicial Review*, R. p. 8). Appellants stated in their brief to the District Court, “Considering the 1995 Comp. Plan was moot by the time the Board decided Savala’s application, the application process should have started over with submission of a new application requesting amendment of the 2010 Comp Plan.” (R. Ex. *Petitioner’s Opening Brief*, p 6.) Appellants now take a slightly different tact in their attempt to continue down this same new and unpreserved path when they argue “The Board committed a legal nullity in trying to amend a plan that had been repealed.” *Appellant’s Opening Brief*, p.12. Judge Petrie held “Petitioners now protest the use of the 1995 plan as the basis for the Commissioner’s analysis on these issues; however, this court finds that despite at least two opportunities to protest the use of the 1995 plan, petitioners failed to object at either of the October 2005 hearings on this issue. In fact Mr. Gigray, throughout his comments at the October 2005 hearing refers to various provisions of the 1995 plan, even commenting “I understand that point.” Accordingly, for purposes of judicial review, this court cannot, and will not, consider an issue not properly preserved at the Commissioner’s proceedings. *Whitted, supra*, at 122, 44 P.3d at 1177.” *Memorandum Decision on Judicial Review*, R. p. 58-59.

The 2010 Comprehensive Plan became effective October 20, 2005. See 2010 Comprehensive Plan cover page. The 2010 Plan was enacted before the commencement of any of the three hearings before the County Commissioners. Appellants argue that there was some understandable confusion regarding their lack of objection during the proceedings. *Appellant's Opening Brief*, p.14. In fact the Commissioners were very clear and thorough in their notice, description and analysis of the proceedings. Commission Chairman Matt Beebe conducted the hearings and in his opening statements made the purpose of the proceedings very clear.

Okay. Lets go ahead and get started because I know we have miles to go today. Good morning everyone. Today is Tuesday and that would be October 25<sup>th</sup> and we're a little after 9:00 in the morning and we are scheduled at this date and time to hold a public hearing on a request by Edward Savala for a comprehensive plan map change from an agricultural designation to a community commercial designation and a conditional rezone of approximately 8.09 acres from A, agricultural, to c-2, community commercial.

(R. Ex. 10/25/05 Transcript, Tr. P.3 lls 2-10.) The Commissioners were very clear that the first item to be addressed was the comprehensive plan map change. Commissioner Beebe stated:

"The other issue that I will point out to you is the first item that is up on our list for consideration this morning is the comp plan map change and based on the decision that we make on that – this was denied by the Planning and Zoning Commission and I have got no idea what direction this board may go, but if we end up overturning Planning and Zoning's decision on the comp plan map change, then the statutes require us to hold another hearing. We can't just continue on." (R. Ex. 10/25/05 Transcript, Tr. p. 4. lls 8-15.). The County Commissioners further emphasized during testimony by Mr. Lakey at the October 2005 hearings that the 1995 comprehensive plan was applicable and was to be used and referenced in the proceedings.

(R. Ex. 10/25/05 Transcript, Tr. p. 33, ll. 21-24.)

The purpose of the hearing was clear. During these October 2005 hearings Appellants raised no objection to the proceedings and the BOCC's ability to amend the 1995 CCCP Map. Appellants certainly argued their view of the facts and merits of their case and advocated that the 1995 CCCP Map should not be amended because the application did not meet the criteria for amendment. However, at no time did they object that the Board could not amend the plan map. There is a vast difference between the argument that the Plan Map should not be amended based on the merits and the objection and argument that the Board could not amend the Plan Map because it was no longer effective.

After analyzing the testimony and evidence presented during the October 2005 hearings the BOCC determined and stated on the record that the comprehensive plan supported the amendment of the 1995 Plan Map.<sup>5</sup> (R. Ex. 10/27/05 Transcript, Tr. p.44 lls 11-24.) The Chairman advised that this would necessitate another hearing to consider the amendment of the 1995 CCCP Map. From the beginning Appellants were knew that the BOCC was conducting these hearings to consider amendment of the 1995 CCCP Map. Following the October 2005 hearings they were made very aware that the BOCC felt it was appropriate to amend the comp.

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<sup>5</sup> Appellants erroneously argue in their brief "Alternatively, the Board could have found that Savala's conditional rezone application was harmonious with the 1995 Comp. Plan in existence at the time of application. It did not find this, likely because the conditional rezone was not harmonious with the 1995 Comp. Plan without the Map amendment." *Appellant's Opening Brief*, p. 12. The Board conducted a detailed analysis of the 1995 CCCP factors following the testimony and evidence present during the October 2005 hearings. Following this discussion and analysis, the Board did conclude that the 1995 CCCP supported Savala's request and that the Map should be amended. R. Ex. 10/27/05 Transcript, Tr. p.44 ll. 11-24. This finding necessitated the further hearings where they reached a similar conclusion.

The Appellants also seem to think the comp. plan map was amended to support the analysis or decision when in reality the request was analyzed under the 1995 Comp. Plan and based on that analysis the map was amended.

plan map based upon the testimony and evidence presented to that point and that the Board was going to conduct a second hearing on the matter.

The second hearing commenced on March 14, 2006 and also began with a clear explanation of the nature of the proceedings.

“All right. Good morning everyone. Today is Tuesday, March 14, 2006 and we’re about a quarter after 9:00 in the morning and we are scheduled at this time and day to hold a public hearing on a request by Edward Savala for a comprehensive plan map change from an agricultural designation and a conditional rezone of approximately 8.09 acres from A ag to C-2 community commercial”

R. Ex. 03/14/06 Transcript, Tr. p. 4. lls 2-8. Appellants had another opportunity to object to the Board’s ability to amend the 1995 CCCP Map. Again the Appellants argued the merits and took the position that the 1995 CCCP applied. No objection was made regarding the Commissioner’s ability to amend the 1995 CCCP Map. The second set of hearings concluded on March 31, 2006. Following discussion and analysis of the testimony and evidence presented in the second hearing, the Board concluded it was appropriate to approve Savala’s application. The Board then conducted a third hearing. The third hearing commenced as follows:

Good afternoon everyone. Today is still March 31, 2006 and we’re about 20 after 1:00. I apologize for being slightly late. The old Idaho Northern Train had me held up getting across the railroad tracks. At any rate, we are gather here this afternoon to once again take up holding a public hearing on a request by Edward Savala for a comprehensive plan map change from an agricultural designation to a community commercial designation and a conditional rezone on approximately 8. (sic) acres from A, agricultural zone to a C-2, community commercial zone.

R. Ex. 03/31/05 Transcript, Tr. p. 104 ll. 9-18. During the third and final hearing no objection was raised by the Appellants.

The Commissioners held three hearings over more than five months on Savala's application and during all of these proceedings, the Board of County Commissioners were very clear they were considering Dr Savala's application for a comprehensive plan map amendment under the 1995 CCCP and conditional rezone. In fact the October 2005 hearings focused primarily on the comprehensive plan map amendment. As the District Court noted Appellants had the opportunity to object to the application and the amendment of the 1995 CCCP. Judge Petrie properly held "[F]or purposes of judicial review, this court cannot, and will not, consider an issue not properly preserved at the Commissioner's proceedings. Issues may not be raised for the first time on appeal." *Memorandum Decision on Judicial Review*, R. p. 58-59. "It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." *Whited* at 121-122 citing *Roberts v. Bonneville County*, 125 Idaho 588, 877 P.3d 842 (1994). "Hence issues not raised below but raised for the first time on appeal will not be considered or reviewed." *Whited* at 122, citing *Post Falls Trailer Park v. Fredekind*, 131 Idaho 34, 962 P.2d 1018 (1998); *Schiewe v. Farwell*, 125 Idaho 46, 867 P.2d 920 (1993). Therefore, Appellant's newly raised arguments that the 1995 CCCP was moot, that the Commissioners could not amend 1995 CCCP Map, and/or that Savala should be required or could pursue some different course of action were not preserved and are not proper for review and consideration on appeal.



**B. Idaho Law Protects Savala's Right to Proceed with his Application.**

If this Court were to find that despite the lack of objection, Appellants were able to raise new issues on appeal, Savala's right to proceed with his application is protected by Idaho Law. Idaho law strongly protects the rights of an applicant in land use matters based upon the timing of their application. "Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application." *Urrutia* at 359. *See also, Payette River Property Owners Assn. v. Board of Commissioners of Valley County*, 132 Idaho 551, 976 P.2d 477 (1999); and *South Fork Coalition v. Board of Commissioners of Bonneville County*, 117 Idaho 857, 792 P.2d 882 (1990). The courts emphasize the purpose behind the ruling is to protect the rights of the individual. The court in *Payette River* noted that the rule protected the individual from retroactive application of an ordinance "merely to defeat an application." *Payette River* at 555. However, there is no requirement of nefarious intent on the part local government in enacting or adopting new ordinances or plans to have individual rights protected as implied by Appellants.

It is clear the intent of the court is to protect the rights of the individual applicant at a particular point in time. In this way the applicant knows what the rules are, what the process is and how to proceed. Appellants want to remove the emphasis on the protection of the individual's rights in time and shift to the protection of the comprehensive plan map at a point in time. It is clear that Savala does not have the right to approval of his request for a conditional rezone and a comprehensive plan map amendment. However, he does have the right to proceed or exercise his rights as they existed under the ordinances in place when he submitted his

application in April 2005. He also is entitled to an approval if he meets the criteria established in the ordinance. Compliance with the applicable ordinance criteria is a question of fact as determined by BOCC and are binding upon the reviewing court as long as the determinations are supported by evidence in the record. *Cowan* at 1263.

Canyon County Zoning Ordinance 05-002 was in place at the time of his application and is still in place. As all seemed to agree, the 1995 Comprehensive Plan was applicable at the time of Savala's application. The Canyon County Zoning Ordinance provided:

07-06-01: INITIATION OF PROCEEDINGS:

(1) Allowed Changes: Any person may apply for the following:

- A. An amendment to the county comprehensive plan at any time;
- B. An amendment to the county comprehensive plan map, however, the commission may recommend amendments to the land use map component of the comprehensive plan to the board not more frequently than once every six (6) months;
- C. An amendment to this chapter;
- D. Amendment to official zoning maps;
- E. Rezones.

(2) Applications: All applications for the above changes or amendments shall be filed with DSD. An application must be accompanied by a filing fee as provided by section 07-04-05 of this chapter. Applications shall contain all necessary information.

(3) Comprehensive Plan Changes: Requests for comprehensive plan changes and ordinance amendments may be consolidated for notice and hearing purposes. Although these procedures can be considered in tandem, pursuant to Idaho Code section 67-6511(b), the commission, and subsequently the board, shall deliberate first on the proposed amendment to the comprehensive plan; then, once the commission, and subsequently the board, has made that determination, the commission, and the board, should decide the appropriateness of a rezone within that area. This procedure provides that the commission, and subsequently the board, considers the overall development scheme of the county prior to

consideration of individual requests for amendments to zoning ordinances. The commission, and subsequently the board, should make clear which of its findings relate to the proposed amendment to the comprehensive plan and which of its findings relate to the request for an amendment to the zoning ordinance.

The ordinance grants Savala the right to initiate proceedings for a comprehensive plan map amendment. CCC 07-06-01 (1)(A). The ordinance grants the Applicant the right to have the Board consider his request for the proposed amendment to the comprehensive plan when it states "the commission and subsequently the board shall deliberate first on the proposed amendment to the comprehensive plan"; then once the commission and subsequently the board, has made that determination, the commission, and the board, should decide the appropriateness of a rezone within that area." CCC 07-06-01 (3) (emphasis added). This states that the board shall deliberate on the proposed amendment. The criteria for an amendment are set out in the zoning ordinance as follows.

07-06-03: COMPREHENSIVE PLAN AMENDMENT  
CRITERIA:

(1) The commission shall review the particular facts and circumstances of each proposed zoning amendment and make a recommendation regarding the same to the board. The commission and the board shall make its review in terms of the following standards and shall find adequate evidence answering the following questions about the proposed comprehensive plan amendment:

- A. Whether a general type of growth should be permitted in a particular area.
- B. What are the plans for city services to the area identified in the proposed change.

The BOCC reviewed these criteria thoroughly and determined Savala's request should be approved. Savala had the right to apply for a comprehensive plan map change and have the

change considered and a decision rendered based on the ordinance criteria in effect. To argue otherwise would constitute the type of change in the rules the courts wanted to avoid.

Appellants present unreasonable and unrealistic policy arguments against allowing Savala's application to be considered. They argue that amending the comprehensive plan map "would create uncertainty as to what the terms of the repealed act even were. Allowing such amendment would create ambiguity as to which comp plan applies in the future to the subject property." *Appellants Opening Brief*, p. 10. These arguments ignore the nature of the rule and the courts' holdings. The rule only protects Savala's rights as they existed in April 2005 and pertain only to this specific application. Once the decision on this application is made, Savala gets back in line with everyone else. The rights of Savala or any other future applicant would be established at the time such future application is filed.

Appellants approach does not protect the rights of the applicant. Savala had the right to have his application considered and a decision rendered. The BOCC followed the ordinance and applicable criteria in approving Savala's application. Therefore, Appellant's argument that Savala should not have been allowed to have his request for a comprehensive plan map amendment considered should be denied.

**C. If Appellant's Have Standing to Challenge Amendments of a Comprehensive Plan, the 2010 Comprehensive Plan has no Application to the Approval of Savala's Request**

The 2010 Comprehensive Plan has no application to the merits of this case. The comprehensive plan in effect at the time Savala filed the application governs the applicant's rights. *Urrutia* at 359-360. Mr. Gigray and the Applicant agree that the application was

submitted under and subject to the 1995 CCCP.<sup>6</sup> The District Court affirmed this position in its decision. *Memorandum Decision on Judicial Review*, R. p. 58. The BOCC properly evaluated Savala's application under the 1995 CCCP. Savala is not required to pursue any approval under the 2010 Comprehensive Plan. The action by the Board amending the 2010 Plan Map was done to reflect the decision approving Savala's application. The BOCC stated "Under the 2010 Canyon County Comprehensive Plan Map, the subject property must be designated as Impact Areas and Urban Growth in order to implement the Board's decision in this case." R. Ex. CCR, p. 92 (emphasis added). The Board noted their decision was made and the 2010 Plan was updated to reflect that decision. Amendment of the 2010 Map was not part of the approval process or necessary for the approval of Savala's application. Therefore, even if the Appellants had statutory authority to challenge the action by the Board to amend the 2010 Comprehensive Plan Map and this court was to remand that issue back to the Commissioners, it would not have any impact on the approval of Savala's application.

**D. Even if Appellant have a statutory basis to challenge the amendment of the County Comprehensive Plan, Canyon County Substantially Complied with Notice and Due Process Requirements Pertaining to the Amendment of the 2010 Comprehensive Plan Map.**

Appellants complain that "The Board amended the 2010 Comp. Plan without notice and hearing and without recommendation from P&Z." (*Appellant's Opening Brief*, p. 15).

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<sup>6</sup> Mr. Gigray correctly points out: "The Board of County Commissioners has already determined that the "Comprehensive Plan Canyon County, Idaho 1995 Amendment (Update)" applies by its actions in granting the requested Comprehensive Plan Map amendments. The subject comprehensive plan was in effect at the time of the filing of the above referenced application. In Idaho, "an applicant's rights are determined by the ordinance in existence at the time of the filing of the application for the permit." *Opposition Statement in Opposition to Appeal of Applicant*, R. p. 26.

Appellants' argument fails on several levels. As stated previously they lack statutory authority to appeal the county's amendment of the 2010 Comprehensive Plan Map. However, if the court finds that they have such authority, the Board's action to amend the 2010 Map was simply a reflection of the decision on the merits. The Board granted expansive due process in this case by conducting three separate hearings and considering several days worth of testimony and evidence both for and against. The Appellant's had repeated opportunities to present their testimony and evidence on whether Savala's property area should be noted for commercial uses on the County Comprehensive Plan Map.

Comprehensive plans may be amended through a public hearing process with notice provided in accordance Idaho Code which states: "At least fifteen (15) days prior to the hearing, notice of the time and place and a summary of the plan to be discussed shall be published in the official newspaper or paper of general circulation within the jurisdiction." Idaho Code § 67-6509(a). Canyon County has also established notice requirements for hearings involving amendments to the comprehensive plan. "At least fifteen (15) calendar days prior to the hearing, a notice of the intent to adopt, repeal or amend the comprehensive plan or this ordinance, as described above, stating the time, place, intent and summary of the proposed action shall be sent to all political subdivisions providing services within the planning jurisdiction, including school districts, and a like notice shall be published in the official newspaper or newspaper of general circulation in the county." CCC 07-05-01(2)(A). The county's notice requirements are slightly more expansive than the Idaho Code. The notice published, mailed and posted by the county stated:

NOTICE IS HEREBY GIVEN that the Canyon County Board of Commissioners is scheduled to hold a public hearing on a request by Edward Savala for a Comprehensive Plan Map Change from an Agricultural designation to a Community Commercial designation and a Conditional Rezone of approximately 8.09 acres from and "A" (Agricultural) zone to a C-2 (Community Commercial) zone. Also requested is approval of a Development Agreement.

*Respondent's Exhibit #1, R. Ex. CCR, p. 196 (emphasis added).*

The notice meets the specified requirements. It clearly provides that Savala is requesting a comprehensive plan map change. It also specifies the nature of the change – that being from an agricultural designation to a commercial designation. "... [D]ue process applies to quasi-judicial proceedings like those conducted by zoning boards, and such due process requires notice of the proceedings, a transcribable verbatim record of the proceedings, specific written findings of fact and an opportunity to be present and rebut evidence. *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 198, 46 P.3d 9 (2002) citing *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App.1996). In affirming the Board's decision the court noted "The application in the present dispute, however, regardless of the title, addressed the substance of the concept approval. *Friends* had notice of the contents of the application and its members were present at all of the public hearings, and they were allowed to comment over several months." *Friends* at 198. The court in *Friends* went on to state regarding compliance with notice requirements that "... substantial compliance rather than strict compliance was sufficient."

The court held that "In the present case, as in *Taylor*, there was at least substantial compliance, without a showing of prejudice by *Friends* to overturn the Board's approval, and

thus Friends has not show that its due process rights were violated.” *Friends* at 199. Appellants were not prejudiced. In this case Appellants had notice of the nature of the proceedings and were given extensive opportunities to argue the change from an agricultural designation to a commercial designation. As has been discussed previously, the 1995 CCCP applied to Savala’s case and the evaluation of the merits of this case. The appellants and their counsel Mr. Gigray actively participated in the process and provided testimony and evidence in several hearings over a number of months. The decision of the BOCC was simply reflected on the 2010 Comprehensive Plan Map.

**IV. THE CANYON COUNTY BOARD OF COMMISSIONERS CORRECTLY DETERMINED, BASED ON SUBSTANTIAL COMPETENT EVIDENCE, THAT SAVALA’S REQUEST FOR A COMPREHENSIVE PLAN MAP AMENDMENT AND CONDITIONAL REZONE COMPLIES WITH THE REQUIREMENTS OF CANYON COUNTY ZONING ORDINANCE 7-06-01 ET SEQ.**

In reaching its decision to approve the subject land use request, the Canyon County Board of Commissioners conducted three separate and comprehensive hearings taking testimony and reviewing the evidence presented by both sides. The Board thoroughly reviewed the factors required for determining whether to grant a comprehensive plan map amendment and conditional rezone and correctly concluded that Savala’s proposed land use satisfied these factors. The Board’s consideration of these ordinance requirements, and the Board’s factual findings and reasoning in relation thereto, were extensively addressed at the hearing and in the Findings of Fact, Conclusions of Law and Order, issued by the Board on May 4, 2006. The Board’s factual findings are binding upon the court even where there is conflicting evidence as long as the determination is supported by substantial and competent evidence. *Cowan* at 1263, *citing*,



*Fischer v. City of Ketchum*, 141 Idaho 349, 351, 109 P.3d 1091, 1094 (2005). “Substantial and competent evidence is less than a preponderance of evidence but more than a scintilla. *Evans v. Haras Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993). Substantial and competent evidence need not be uncontradicted, nor does it necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.” *Cowan* at 1263. The following is a review of each of these factors and a summary of the substantial competent evidence related thereto that was relied upon by the Board in reaching its decision to grant the subject conditional use permit.

**A. The Canyon County Board of Commissioners Lawfully Determined that Savala’s Request for a Comprehensive Plan Amendment Should Be Granted.**

The Board reviewed the required factors established to determine the appropriateness of a request to amend the comp plan. Those factors are: (1) Whether a general type of growth should be permitted in a particular area?; and (2) What are the plans for city services to the area identified in the proposed change? CCC 07-06-03 (1).

The first question to be answered is whether a particular type of growth should be permitted in an area and this “...involves a thorough review of the Comprehensive Plan....” (R. Ex. 10/25/05 Transcript, Tr. p.5 l. 25, p.6 l.1.) *Price* at 430. The Board determined that the 1995 CCCP applied to Savala’s application. (R. Ex. 10/27/05 Transcript, Tr. p.6, ll. 18-23.) The Board limited its analysis and review to the 1995 CCCP because the application was submitted under that plan. (R. Ex. 10/27/05 Hearing, Tr. p.6, ll. 18-23.)

In reviewing the comprehensive plan the Board found policies in the plan that supported the application and policies that were not supportive and policies that came out neutral with both sides having facts supporting their position in relation to that policy. It is expected that a land use application may not agree with all aspects of the comprehensive plan. *Urrutia v. Blaine County Board of Comm.*, 134 Idaho 353, 358, 2 P.3d 738 (2000). In considering all of the testimony and evidence, applying that to the ordinance requirements and making their decision, the Board found the weight of that analysis supported Savala's application. The Board's evaluation of Comprehensive plan and conflicting evidence is a factual issue. *Evans v. Teton County* at 76. These factual findings are binding as long as they are supported by substantial competent evidence. *Fischer v. City of Ketchum*, 141 Idaho 349, 351, 109 P.3d 1091, 1094 (2005). The Board's thorough approach to this matter is evidenced by their questions and discussions in the three hearings and the extensive written findings which demonstrate that their analysis was not arbitrary or capricious and is based on substantial competent evidence in the record.

The following are some of the factors analyzed by the Board. The Commissioners found that aspects of the Population Policies supported the request. Population Policy One (1) states "To provide the planning base for an anticipated population of at least 105,000 by the year 2000 and 120,000 by the year 2010." (1995 CCCP, p. 4-5). Commissioner Ferdinand noted that the 1995 CCCP substantially underestimated the growth that would occur in Canyon County and stated that the population in 2005 was 164,000. (R. Ex. 10/27/05 Transcript, Tr. p.8 l. 1.) Commissioners Ferdinand and Beebe felt that the intent of the policy was to plan for the needs of

population growth and that this request would support that intent and the needs of the county population that has grown at a much higher rate than anticipated. (R. Ex. 10/27/08 Transcript, Tr. p.8 ll. 2-9, 21-25, p. 9, ll. 1-8.)

Economic Development Policy One (1) reads "To encourage development of additional employment opportunities and economic diversity in Canyon County." (1995 CCCP, p. 6.). The proposal will bring 25-45 additional jobs to the area with estimated annual combined salaries totaling approximately one million dollars (\$1,000,000.00). (R. Ex. CCR, p. 52). The Commissioners found Savala's application to be supported by this policy. (R. Ex. 10/27/05 Transcript, Tr. p.13 ll. 5-19.)

Overall Land Use Policy Two (2) states "To protect agricultural, residential, commercial, industrial and public areas from the unreasonable intrusion of incompatible land uses." (1995 CCCP, p.7). In finding this policy to be neutral Commissioner Ferdinand stated that this area has been designated for commercial uses and that this designation should also be protected. "In this particular instance, if we're talking commercial, then that area should be protected as much as the Sunnyslope Market or anything else." (R. Ex. 10/27/05 Transcript, Tr. p. 18, ll. 7-10.) Commissioner Beebe felt any intrusion would not be unreasonable considering the proposed site plan and existing features of the property that provide some separation from other uses. (R. Ex. 10/27/05 Transcript, Tr. p. 18, ll. 20-25, p. 19, l. 1.)

Community Commercial Policy One (1) states "To identify locations for community commercial land uses which fulfill general retail shopping needs and travel or highway related service needs." (1995 CCCP, p. 12). Commissioner Beebe stated "There is already an

established precedent for some forms of commercial activity in that immediate vicinity so based on that, I'm going to give it a positive." (R. Ex. 10/27/05 Transcript, Tr. p. 28, ll. 1-4.)

The Commissioners recognized that there would be substantial involvement by other agencies in regards to certain aspects of this project, including ITD, DEQ and Southwest District Health. (R. Ex. 10/27/05 Transcript, Tr. p. 35, ll. 1-4.)

The Board evaluated the policies of the 1995 CCCP and discussed the Map and the red dots at length. The map designations showing commercial uses planned in this area was important in their evaluation of the Comprehensive Plan. The commissioners ultimately considered the weight of the Comprehensive Plan policies, the red dots on the map denoting the area as appropriate for commercial activities and the existing commercial uses in the area to conclude that the area was appropriate for this type of development and the majority voted to support Savala's request to amend the comprehensive plan. (R. Ex. 10/27/05 Transcript, Tr. p. 45, ll. 2-3.)

The Board discussed the plan for city services in the area and found that there were no immediate plans for city services. (R. Ex. 10/27/05 Transcript, Tr. p. 39, ll. 2-12.) The applicant will be installing community water and waste water systems and these systems will be subject to regulation by the Department of Environmental Quality (DEQ), Southwest District Health (SWDH) and Idaho Department of Water Resources (IDWR). (R. Ex. CCR, p. 48.)

After reviewing the testimony and evidence the Board determined that Savala's application for comprehensive plan map amendment should be granted. (R. Ex. CCR, p. 50.) Once the Board determined that the comprehensive plan map should be amended, they

proceeded to a second hearing since their determination was a material change from the recommendation of the planning and zoning commission. (R. Ex. 10/27/05 Transcript, Tr. p. 4, ll. 7-19.)

On March 14, 2006 the Board conducted a second hearing and again took voluminous testimony and evidence from both sides regarding the application. After a full day the Board continued the hearing to March 31, 2006 to take rebuttal testimony and deliberate. (R. Ex. 03/14/06 Transcript, Tr. p. 225, ll. 14-20.) The Board reviewed all of the testimony and evidence and conducted an analysis of plan policies and the factors under CCC 07-06-03 (1). The Board determined the comprehensive plan supported Savala's request. (R. Ex. CCR, pp. 88, 92).

The Board found that the commercial map designations in the area and the existing commercial uses supported the application. Commissioner Beebe stated "There is and has been in that area already established commercial uses as we had somewhat extensively discussed in our earlier portions of this hearing. You know, there's the commercial node down around the corner with the Sunnyslope market and there's a restaurant there. Also we're all aware that there are numerous winery type operations down along Sunnyslope Road. And then to east of the subject property is the Huston Post Office and the old unincorporated community of Houston which had for many years a general store which I believe unfortunately has fallen by the wayside but, a long established area there." (R. Ex. 03/31/06 Transcript, Tr. p. 80, ll. 14-25.) He further stated "... I am still comfortable with the red dot there indicating that this area, at least in the 95 comp plan, was generally considered to be -- have potential for some sort of commercial node so with I will give your community commercial also a positive." (R. Ex. 03/31/06 Transcript, Tr. p.

81, ll. 7-12.) The Board determined that the type of commercial use proposed by Savala complied with the comprehensive plan and should be permitted in the area. (R. Ex. 03/31/06 Transcript, Tr. p. 84, ll. 3-11.)

The Board again voted to amend the comprehensive plan in accordance with Savala's request. (R. Ex. 03/31/06 Transcript, Tr. p. 86, ll. 22-24.) Although not in accordance with Appellant's wishes, the Board evaluated the conflicting evidence and made a factual determination approving Savala's request. Their findings and conclusions were based on substantial and competent evidence and were not arbitrary or capricious.

**B. The Board Correctly Determined that the Requested Conditional Rezone Should be Granted.**

Following the decision to amend the comprehensive plan the Board evaluated the request for the conditional rezone. A request for a conditional rezone is evaluated under the following criteria:

- a) Whether the zoning amendment is harmonious and in accordance with the applicable comprehensive plan;
- b) Whether the proposed use will be injurious to other property in the immediate vicinity and/or will negatively change the essential character of the area;
- c) Whether adequate sewer, water and drainage facilities and utility systems are to be provided to accommodate said use;
- d) Whether measures will be taken to provide adequate access to and from the subject property so that there will be no undue interference with existing or future traffic patterns;
- e) Whether essential public services such as, but not limited to, school facilities, police and fire protection, emergency medical

facilities, will be negatively impacted by such use or will require additional public funding in order to meet the needs created by the requested change.

CCC 07-06-05(1).

**1) Savala's Rezone Request was Harmonious and In Accordance with the 1995 Comprehensive Plan.**

The Board reaffirmed their analyses of the comprehensive plan from the previous hearings. (R. Ex. 03/31/06 Transcript, Tr. p. 87, ll. 5-17.) The Board heard testimony from many experts and individuals in support of the application. For example, Bill Russell, a licensed professional engineer with particular expertise and experience in traffic engineering and design. (R. Ex. 10/25/05 Transcript, Tr. p.123, ll. 16-21.)<sup>7</sup> Dr. Christian Petrich has a Masters Degree in civil engineering, a PhD in geology and is a license professional engineer with expertise in ground water and water systems. (R. Ex. 10/25/05 Transcript, Tr. p. 105, ll. 16-18.) Richard Orton has a B.S. and Masters in Civil Engineering with expertise and experience in sanitary engineering. (R. Ex. 10/25/05 Transcript, Tr. p. 115, ll. 20-24). Charles Robinson, an agronomist and crop advisor who lives and works in the area. (R. Ex. 10/25/05 Transcript, Tr. p. 73, ll. 2-9.) Steve Fultz and Matt Ellsworth with the Caldwell Economic Development Council. (R. Ex. 10/25/05 Transcript, Tr. p. 142, l. 16, p. 148, l. 6.) Dr. Savala spoke with Community leaders like Garret Nancolas, the Mayor of Caldwell and Anna Tveidt, the former Mayor of Houston and they submitted letters in support. Dr. Savala also conducted a non-scientific but

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<sup>7</sup> Mr. Vickers, one of the appellants, offered much testimony on traffic issues but his expertise is in sanitary engineering. (R. Ex. 10/25/05 Transcript, Tr. p. 181, l. 16.)

unbiased survey of hundreds of people throughout the area and submitted those results his exhibits.

There was much testimony and discussion during the hearings about the red dot near the subject property and the other red dots in the area. The red dots represent rural or commercial centers where commercial development is appropriate. There are three dots in the area with one of those located immediately across Highway 55 from Savala's property. 1995 CCCP Map.

Comprehensive Plans are guiding documents that represent desired or future or projected land uses. *Urrutia* at 357-58. Appellant's argument that the red dot near Savala's property should be interpreted and strictly limited to the Huston Post Office ignores the fundamental language of the comprehensive plan itself and the purpose of comprehensive plans as stated in Idaho Code and by the Idaho Supreme Court. The comprehensive plan map "...depicts desired land use patterns in a general way...." 1995 CCCP, p. 3. "The Plan Map designates land use areas. The designations are general and are to be used for planning purposes." 1995 CCCP, p. 3. The purpose of the comprehensive plan map is to indicate "...suitable projected land uses for the jurisdiction." Idaho Code § 67-6508(e). There are thirteen (13) red dots on the 1995 CCCP Map designating locations appropriate for rural commercial development. 1995 CCCP Map. By their nature as rural centers, most of these red dots (11 of 13) representing rural commercial areas are located outside the impact areas. 1995 CCCP Map. The county planning staff also recognized that the area is appropriate for commercial development and that the application complied with the comprehensive plan when they analyzed the application and recommended approval of Savala's request. (R. Ex. *Intervenor/Respondent's Brief* filed 5-1-07, Exhibit A-1). The



BOCC's decision approving Savala's request was clearly based upon substantial and competent evidence and not arbitrary and capricious.

**2) The Proposed Use Will Not be Injurious to Other Property in the Immediate Vicinity or Negatively Change the Essential Character of the Area.**

The Board found that the application would not be injurious to other property owners in the immediate vicinity and noted that state regulatory agencies will review and address potential negative impacts. (R. Ex. 03/31/06 Transcript, Tr. p. 88, ll. 2-6.) The project will not have substantial negative impacts on agricultural operations in the area. Charles Robinson is a professional agronomist that lives in the area. He is familiar with nearby farming operations and has consulted on them in the past and continues to consult on some of the currently. (R. Ex. 10/25/05 Transcript, Tr. p 73, ll. 13-15.) Mr. Robinson stated that "a development of this type will not have any adverse effects on surrounding agriculture". (R. Ex. 03/31/06 Transcript, p. 130, ll. 10-13.) Mr. Robinson also stated that this development would fit very well in the area and it is not taking agricultural ground out of production. (R. Ex. 10/25/05 Transcript, Tr. p 73, ll. 10-12.) He felt that the project as proposed would also have little impact on agricultural traffic. (R. Ex. 10/25/05 Transcript, Tr. p 76, ll. 23-25.) Nearby farmers use Pride Lane and the back roads while and very seldom use Highway 55. (R. Ex. 03/31/06 Transcript, Tr. p 73, ll. 16-23.) Dr. Savala spoke with St. Chapelle Winery and they thought the project was positive. (R. Ex. 03/14/06 Transcript, Tr. p. 61, ll. 14-16.) The development will also include extensive landscaping as well as some fencing to buffer other uses. (R. Ex. CCR, p. 141.) The Board also concluded that the application will not negatively change the essential character of the area with

Commissioner Beebe stating “You know there is a red dot on the comp plan map, other commercial activity to the east and to the south around the corner so I don’t believe it is going to negatively change the essential character of the area...” (R. Ex. 03/31/06 Transcript, Tr. p. 88, ll. 17-24.)

**3) Adequate Sewer, Water, Drainage and Access to Be Provided.**

The Board found that adequate sewer, water and drainage facilities would be provided by the applicant. (R. Ex. 03/31/06 Transcript, Tr. p. 88, ll. 23-25, p. 89, ll. 1-3.) The Board determined that access would be addressed and controlled by ITD and that Savala would have to meet their requirements. (R. Ex. 03/31/06 Transcript, Tr. p. 89, ll. 7-16; R. Ex. CCR, p. 144.) The Commissioners concluded that essential public services would not be negatively impacted or required additional public funding in order to meet the needs of Savala’s project. (R. Ex. 03/31/06 Transcript, Tr. p. 89, ll. 23-25, p. 90 ll. 1-8.)

**4) Prime Farm Land is Not Being Lost.**

The Canyon County Comprehensive Plan and the Idaho Code reference the preservation of “prime agricultural land”. *See*, CCCP Preface (e), Population Policy No 4. p 5., Idaho Code § 67-6502(e). The Code and CCCP encourage the preservation of “prime” farm ground not simply ground that may have been used for farming. The nature of the parcel and the testimony and evidence presented by Charles Robinson, an agronomist familiar with the subject property and with ground farmed in the area, and Dr. Savala’s personal experience on the parcel support the fact that this is not prime farm ground. The fact that some crops will grow does not make it prime or even viable farm ground.

Appellants reference the Idaho Right to Farm statute but ignore its effect. The right to farm statute provides additional support to Savala's application because it helps limit conflicts between agricultural and other uses. The Idaho Supreme Court recognized this fact in its decision in *Whitted*. "The Act protects existing agricultural operations from being declared a nuisance as long as the operation is not improper or negligent." *Whitted* at 124.

**V. APPROVAL OF SAVALA'S REQUEST DOES NOT CONSTITUTE UNLAWFUL SPOT ZONING.**

Appellants erroneously claim that the approval of Savala's request for a conditional rezone constitutes unlawful spot zoning.<sup>8</sup> (*Appellant's Opening Brief*, p. 23). Their argument and analysis ignores the principal determining factor in deciding whether a decision amounts to unlawful spot zoning – the county's comprehensive plan. A decision made in conformance with the comprehensive plan nullifies a claim of unlawful spot zoning. In *Evans v. Teton County*, the Teton County Commissioners approved an application for a planned unit development (PUD) and rezone to convert 780 acres of mostly undeveloped farm land and wetlands into a golf course, resort and residential development. *Evans v. Teton County* at 73. Among the multiple issues raised by the opponents of the project on appeal, the appellants claimed the commissioners' decision constituted "spot zoning". The Idaho Supreme Court in upholding and affirming the Commissioners' decision in *Evans v. Teton County* held "A claim of 'spot zoning' is essentially an argument that the change in zoning is not in conformance with the

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<sup>8</sup> Additionally, the County Code states that conditionally rezoning a parcel shall not constitute "spot" zoning and shall not be presumptive proof that the zoning of other property adjacent to or in the vicinity of the conditionally rezoned property should be rezoned the same. CCC 07-06-07(3).

comprehensive plan. *See Price*, 131 Idaho at 432, 958 P.2d at 589.” *Evans v. Teton County* at 77.

The court noted further that:

There are two types of ‘spot zoning’. *Dawson Enter., Inc. v. Blaine County*, 98 Idaho 506, 514, 567 P.2d 1257, 1265 (1977). Type one spot zoning may simply refer to a rezoning of property for a use prohibited by the original zoning classification. *Id.* The test for whether such a zone reclassification is valid is whether the zone change is in accord with the comprehensive plan. *Id.* Type two spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner. *Id.* at 515, 567 P.2d at 1266.

*Evans v. Teton County* at 78, citing *Dawson* at 514-515.

As in our case at hand, the Teton County Commissioners in *Evans v. Teton County* approved the application with conditions after hearing and considering testimony from many experts and citizens both in favor and in opposition. In Savala’s case, the Board of Commissioners considered testimony and evidence in favor from numerous experts, citizens, and community and economic leaders. The Board conducted a thorough analysis of the comp plan finding factors in favor, neutral and opposition before determining that the weight of the comprehensive plan supported the application. Although there was substantial testimony and evidence in the record that this would benefit many citizens and other entities in the area<sup>9</sup> such an analysis is not necessary.

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<sup>9</sup> See testimony of Dr. Galvez (R. Ex. 10/25/05 Transcript, Tr. p. 80, ll. 17-72), Dr. Savala (R. Ex. 10/25/05 Transcript, tr. p. 98 ll. 14-15), Marcario Eguia (R. Ex. 10/25/05 Transcript, Tr. p. 67 l. 1 – p. 72 l. 8). Caldwell Economic Development Director Steve Fultz, R. Ex. 10/25/05 Transcript, Tr. p. 143, ll. 8-10.

Appellant's argument that this decision constitutes spot zoning as a use inconsistent with the permitted use in the rest of the zoning district solely for the benefit of Savala not only fails because it is inaccurate but more importantly because the Commissioners' decision complies with the applicable county comprehensive plan. The Appellants in *Evans v. Teton County* made the same claim and the court held "This court must affirm the findings of the Board of Commissioners where, as here, if they are supported by substantial, competent, although conflicting, evidence. *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13. Since the Board of Commissioner's finding that the zone change is in accord with the comprehensive plan is supported by substantial evidence. The appellant's claim of spot zoning need not be addressed because the type one "spot zoning" in this case is valid." *Evans v. Teton County* at 77. The comp plan determination by the County Commissioners is the principal and dispositive issue in determining whether an action constitutes unlawful spot zoning. Since the Board's factual determination that Savala's application complied with the comprehensive plan is supported by substantial and competent evidence as noted previously herein the appellant's claim of unlawful spot zoning fails.

**VI. THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD OF COUNTY COMMISSIONERS ARE WELL REASONED, BASED ON SUBSTANTIAL COMPETENT EVIDENCE AND NOT ARBITRARY, CAPRICIOUS, NOR AN ABUSE OF DISCRETION.**

Though the Appellants obviously do not agree with the Board's conclusions regarding the subject land use application's compliance with the comprehensive plan, the Supreme Court of Idaho has made it clear that compliance with a comprehensive plan is a question of fact to be

determined by the Board of County Commissioners. *South Fork Coalition v. Board of Commissioners of Bonneville County*, 117 Idaho 857, 792 P.2d 882 (1990).

In his brief, counsel for the Appellants claims that “the Board’s decision is clearly erroneous and an abuse of discretion.” (*Appellant’s Opening Brief*, p. 29). A review of the hearing transcript and the Board’s Findings of Fact, Conclusions of Law and Order, however, clearly establish that Appellant’s assertion is in fact clearly erroneous. The record clearly establishes that the Board extensively reviewed the comprehensive plan in relation to the proposed land use and found that the development is harmonious with, and in accordance with, the comprehensive plan.

The Supreme Court of Idaho has stated that, when reviewing local zoning decisions:

The Court can not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court defers to the agency’s findings of fact unless they are clearly erroneous and the agency’s factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by the evidence in the record. Additionally, there is a strong presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances.

*Rural Kootenai Organization, Inc. v. Board of Commissioners*, 133 Idaho 833, 837, 993 P.2d 596 (1999); *see also*, *Payette River Property Owners Association v. Board of Commissioners of Valley County*, 132 Idaho 551, 976 P.2d 477 (1999).

The preceding discussion in this brief relating to the testimony and evidence supporting the decision of the Canyon County Board of Commissioners, as well as a review of the record,

clearly establishes that the Board's decision was well reasoned and based on substantial evidence. Though there was conflicting evidence presented to the Board at its de novo hearings on this matter, the record conclusively establishes that the Board went through an extensive analysis of the evidence presented to it in light of the requirements of law, ordinance and the comprehensive plan. Thus, it is clear that the Board's factual decision was neither arbitrary, capricious, nor an abuse of discretion.

**VII. INTERVENOR RESPONDENT AND RESPONDENTS SHOULD BE AWARDED ATTORNEYS FEES AND COSTS INCURRED IN CONNECTION WITH THIS ACTION PURSUANT TO IDAHO CODE SECTIONS 12-117(1) AND 12-121. APPELLANTS ARE NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS.**

Idaho Code allows for an award of attorney's fees to a prevailing party in administrative or civil judicial proceedings if the court finds the other party acted without reasonable basis in fact or law. Idaho Code § 12-117(1). Pursuing an appeal without statutory authority constitutes action without reasonable basis in fact or law. *Giltner* at 1241-1242. *See also Highlands* at 904. Idaho Code § 12-121 allows for an award of attorneys fees if an appeal was brought frivolously, unreasonably or without foundation. *Giltner* at 1242.

In *Giltner* the Appellant appealed the county's decision to amend the comprehensive plan map. This court found there was no statute authorizing the appeal of the comprehensive plan map change and awarded attorneys fees and costs to the County and the applicant respondent. *Giltner* at 1242. Similarly in this case, Appellants filed this appeal of the County's decision to amend the comprehensive plan map and have no statutory authority to do so. Additionally,

Appellants filed this appeal challenging the Board's ability to amend the comprehensive plan when they did not preserve that issue for appeal.

In *Highlands*, the appellants appealed the City's decision regarding zoning of property. This court also found that the Appellants lacked statutory authority to appeal the zoning decision of the local governmental entity and awarded fees and costs to the City. *Highlands* at 904. Again similarly in this case, the Appellants appealed the County's decision regarding zoning without a statutory basis. Appellants contention that they filed this appeal before the *Giltner* and *Highlands* decisions were published only puts them in the same category as the Appellants in those cases and does not change the unfounded nature of their appeal.

Therefore Appellants brought this action without reasonable basis in fact or law and/or appealed the County's decision frivolously, unreasonably or without foundation. Savala should be awarded his reasonable attorney's fees and costs under Idaho Code § 12-117 and 12-121. Furthermore, the Commissioners in this case appropriately applied the applicable law and comprehensive plan to the application before them. They conducted multiple hearings and made their decision based on substantial competent evidence. Therefore Appellants are not entitled to an award of attorney's fees and costs.

#### CONCLUSION

Appellants lack statutory authority to appeal the County's amendment of the 1995 Comprehensive Plan. This appeal should be dismissed. Appellants lack statutory authority to appeal the Board's approval of the conditional rezone and development agreement which, from a



development standpoint, simply reflects the rezoning approval and grants no additional development rights. This appeal should be dismissed.

The Appellants actively participated in three separate hearings before the County Commissioners over a period of more than five months. The purpose of those hearings was to consider the approval of the Comprehensive Plan Map amendment, conditional rezone and development agreement. This purpose was clearly stated in the notice and restated before each hearing. At no time did Appellants object to the County Commission's ability to consider and amend the 1995 Comprehensive Plan. Therefore, this issue was not preserved for appeal and should be dismissed.

The 2010 Comprehensive Plan has no application to Savala's request. The 2010 Plan did not and does not impact the approval of Savala's application. The County's amendment of the 2010 Map was done to implement the decision already made approving Savala's application. The Appellant was granted due process and actively participated in the hearings to consider changing the Comprehensive Plan Map designation from agricultural to commercial. Appellants also again lack statutory authority to appeal this Comprehensive Plan amendment.

The County's decision to approve the conditional rezone of Dr. Savala's property did not constitute illegal spot zoning because it complied with the County's Comprehensive Plan.

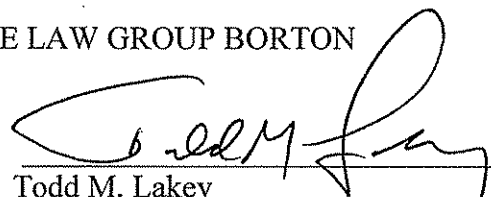
The Board carefully considered and analyzed extensive testimony and evidence from both sides. The Board thoroughly evaluated the application under the applicable ordinance provisions. Their decision was supported by substantial and competent evidence and not clearly erroneous.

Therefore, this appeal should be dismissed or denied and the decision of the District Court and County Commissioners should be affirmed. Savala should be awarded his reasonable attorney's fees and costs because the appeal was brought without a reasonable basis in fact or law and without foundation.

Respectfully submitted this 3<sup>rd</sup> day of October, 2008.

ROSE LAW GROUP BORTON

By



Todd M. Lakey  
*Counsel for Intervenor/Respondent*  
*Dr. Edward Savala*

### CERTIFICATE OF SERVICE

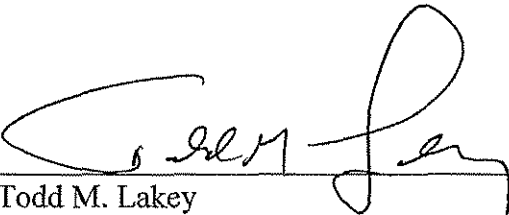
I hereby certify that on the 3<sup>rd</sup> day of October, 2008 I caused to be served two (2) true and correct copies of the foregoing document by the method indicated below and addressed to the following:

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Todd M. Lakey